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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARGARET KEIPER and DAIL
KEIPER, JR., DAIL KEIPER, SR.,

Plaintiffs,

v.

VICTOR VALLEY TRANSIT
AUTHORITY; DINORAH AGUILAR;
TRANSDEV SERVICES, INC.;
VEOLIA TRANSPORTATION
SERVICES, INC.; STEVEN KILTY;
FBN TRANSPORTATION, LLC;
MARDAN TRANSPORTATION LLC;
AMSTON SUPPLY, INC.; and DOES 1
through 100, inclusive,

Defendants.

AND ALL REALTED ACTIONS

Lead Case No. **5:15-cv-00703-BRO(SP_x)**
(Consolidated 5:15-cv-00762-BRO(SP_x);
and 5:15-cv-01481-BRO(SP_x))

**OPPOSITION OF THE BUS
PLAINTIFFS TO THE UNITED
STATES OF AMERICA'S MOTION
TO DISMISS THIRD PARTY
COMPLAINT**



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1 Victor Valley Transit Authority (“VVTa”); Transdev Services, Inc.
2 (“Transdev”); Veolia Transportation Services, Inc. (“Veolia”), and Dinorah
3 Aguilar (“Aguilar”) (collectively, “Bus Plaintiffs”), by and through their counsel,
4 the law firm of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC, hereby
5 submit this Opposition to the *United States’ Motion to Dismiss Third-Party*
6 *Complaint Filed by Bus Defendants* (Doc. #136-1).

7 **I. INTRODUCTION**

8 This case centers on an automobile accident that occurred in the early
9 morning hours of June 2, 2014, on a bypass road leading to Fort Irwin National
10 Training Center, a military base located in the Mojave Desert. A bus, operated by
11 the VVTa, was on its regular route to the base when it collided with a tractor
12 trailer that had been parked in the right lane of the bypass road. Prior to the
13 collision, the driver of the tractor trailer had turned off the engine, turned off all of
14 the lights, and failed to set up any cones, flares or any other warning signals that
15 would indicate that a tractor trailer was parked in an active lane of traffic.

16 Because the collision occurred during the pre-dawn hours, the bus driver
17 saw the tractor trailer just seconds before the impact. The bus driver swerved left to
18 avoid the tractor trailer, but the right side of the bus crashed into the left side of the
19 tractor trailer, which resulted in the death of one passenger and injuries to several
20 others.

21 Suit was brought by the occupants of the bus against Steven Kilty, FBN
22 Transportation, Inc., Mardan Transportation, LLC, Amston Supply, Inc.
23 (collectively, “the Trucking Plaintiffs”) and the Bus Plaintiffs. Subsequently, the
24 Bus Plaintiffs and the Trucking Plaintiffs filed Third-Party Complaints against the
25 United States (hereinafter, “United States,” or “Army”) under the Federal Tort
26 Claims Act (“FTCA”).

27 The United States is open to suit under the FTCA. However, the FTCA
28 exempts claims based upon the performance or failure to perform a discretionary



1 function or duty, which is commonly referred to as the discretionary function
2 exception (“DFE”).

3 Here, the Army has filed a *Motion to Dismiss* (Doc. #136-1) claiming that
4 the DFE bars the Bus Plaintiffs’ claims. The DFE is a two-part test that focuses on
5 the Army’s ability to make decisions free from any liability that may result from
6 that decision. The Army cannot satisfy either part of the two-part test. First, the
7 Army did not have **discretion** to ignore a specific and mandatory Traffic Control
8 Device regulation, and thus the DFE does not apply and the first element cannot be
9 satisfied. Second, even if the Court finds that the Army has satisfied the first prong
10 (*which is highly unlikely*), the DFE still does not apply because the Army’s
11 decision was not grounded in “social, economic, or political policy,” which is
12 required under the second element of the test.

13 II. LEGAL STANDARD

14 A. THE BUS PLAINTIFFS’ THIRD PARTY COMPLAINT 15 INVOKES THE FEDERAL TORT CLAIMS ACT.

16 The FTCA is a limited waiver of the government’s sovereign immunity and
17 is subject to certain jurisdictional exceptions and exclusions. *See* 28 U.S.C. §§
18 1346(b) *et seq.* “[I]n order to effectuate Congress’s intent to compensate
19 individuals harmed by government negligence, the FTCA, as a remedial statute,
20 should be construed liberally, and its exceptions should be read narrowly.”
21 *O’Toole v. United States*, 295 F.3d 1029, 1037 (9th Cir. 2002). The foremost
22 exception is the “discretionary function” exception, which provides that there shall
23 be no liability under the FTCA on:

24 [a]ny claim . . . based upon the exercise or performance
25 or the failure to exercise or perform a discretionary
26 function or duty on the part of a federal agency or an
employee of the Government, whether or not the
discretion involved is abused.

27 28 USC § 1346(b).

28 The Supreme Court has prescribed a two-part test for determining the



1 applicability of the DFE. *See United States v. Gaubert*, 499 U.S. 315, 322-25
 2 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988). Under the first
 3 element, a court must consider “whether the action is a *matter of choice* for the
 4 acting employee.” *Id.* at 536 (emphasis added). The governmental employee *does*
 5 *not* have a choice “when a federal statute, regulation, or policy specifically
 6 prescribes a course of action for an employee to follow.” *Id.*

7 If the governmental actor *does* have discretion in making the choice, then a
 8 court must consider the second element of test. Under the second element, a court
 9 must consider “whether that judgment is of the kind that the discretionary function
 10 exception was designed to shield.” *Id.* Which means the choice must be
 11 “‘grounded in social, economic, and political policy.’” *Id.* at 537 (quoting *United*
 12 *States v. Varig Airlines*, 467 U.S. 797, 813 (1984)).

13 **B. THE ARMY BEARS THE BURDEN OF PROVING THAT THE** 14 **DISCRETIONARY FUNCTION EXCEPTION APPLIES.**

15 The burden of persuasion on the applicability of the DFE lies solely with the
 16 government. *See Terbush v. United States*, 516 F.3d 1125, 1128 (9th Cir. 2008)
 17 (“The United States bears the burden of proving the applicability of the
 18 discretionary function exception.”); *Prescott v. United States*, 973 F.2d 696, 701-
 19 02 (9th Cir. 1992) (the DFE is an affirmative defense and the government bears
 20 burden of proof that it applies); *Senger v. United States*, 103 F.3d 1437, 1444 (9th
 21 Cir. 1996) (same).

22 **III. ARGUMENT**

23 It is important to note that the conduct addressed in the Army’s *Motion to*
 24 *Dismiss* (Doc. #136-1 at 9-10) is different from the conduct addressed in this
 25 *Opposition*. In their *Motion*, the Army focuses (at 9-10) on its decision to design
 26 and build the bypass road.¹ For purposes of this *Opposition*, the Bus Plaintiffs do

27 ¹The Army’s *Motion* also focuses on its “discretionary” decision to ignore warnings from other
 28 truckers regarding the Trucking Defendants’ semi-trailer that was illegally parked in the left lane of the
 bypass road. For purposes of this *Motion*, the Bus Plaintiffs acknowledge that the Army’s decision to
 ignore warnings from other truckers, while recklessly indifferent to human life and safety, is arguably



not dispute that the Army's decision to design and build the bypass road is protected under the DFE. However, once the Army made its decision to design and build the bypass road, the Army was required to follow the specific and mandatory design regulations set forth in the Manual on Uniform Traffic Control Devices ("MUTCD"). (See Doc. #136-3, Ex. "C" (citing NTC Regulation 190-5, § 2-1(a) ("All traffic control devices and signs will conform to the [MUTCD]")). The failure to follow these design regulations forms the basis for the Bus Plaintiffs' Third-Party Complaint. (See *Bus Plaintiffs' Third Party Complaint* ("Keiper"), Doc. #73, ¶ 44 (alleging that "said collision was caused in whole or in part by the failure of military personnel in requiring buses to travel on the Truck By-Pass Road without providing a designated travel lane, as it was so designated after the incident."); (see also *Bus Plaintiffs' Third Party Complaint* ("Chestnut"), Doc. #27, ¶ 44); (see also *Bus Plaintiffs' Third Party Complaint* ("Aguilar"), Doc. #7, ¶ 44).

As it relates to the design of the Fort Irwin bypass road, the Army states that its "plan was to . . . direct all bus traffic to the **left-hand lane** of the bypass road." (Doc. #136-2, at 8:19-25). By the Army's own admission, the left lane of the bypass road was dedicated to preferential use by bus traffic. (See *id.*). Where, as here, the Army contends that it dedicated the left-lane of the bypass road to bus traffic, the Army was required to install longitudinal "**Bus Only**" markings along the left lane of the bypass road.² See MUTCD (CA) § 3B.22 (Ed. 2003 Rev. 1, as

protected under the DFE because the controlling regulations state that "the [Directorate of Emergency Services] **may** . . . [r]emove and temporarily impound a vehicle when it is parked illegally, or for unreasonable periods, as determined by the Garrison Commander or applicable authority." (Doc. #136-3, Ex. "C" (citing NTC Regulation 190-5, § 1-5(b)) (emphasis added).

²The Bus Plaintiffs maintain that, prior to the subject incident, the Army never once communicated its intent to designate the left-lane of the bypass road to bus traffic. The Bus Plaintiffs further maintain that, prior to the subject incident, there was no readily available information, warning, instructions or guidance regarding the use of the left and right lanes of the bypass road.

1 amended for use in California), attached hereto as Exhibit A. Unfortunately, the
2 Army did not install any “**Bus Only**” markings until after the subject incident.

3 As demonstrated more fully below, the Army’s *Motion to Dismiss* should be
4 denied because the Army fails to satisfy either part of the DFE’s two-part test.

5 **A. THE ARMY’S MOTION TO DISMISS SHOULD BE DENIED**
6 **BECAUSE THE ARMY HAS FAILED TO DISCHARGE ITS**
7 **BURDEN OF PROVING THAT THE DISCRETIONARY**
8 **FUNCTION EXCEPTION APPLIES.**

9 **1. THE DISCRETIONARY FUNCTION EXCEPTION DOES NOT**
10 **PROTECT THE ARMY’S FAILURE TO PROVIDE MANDATORY**
11 **WARNING SIGNS.**

12 The first prong of the *Berkovitz* test asks, “whether the action is a matter of
13 choice for the acting employee.” *Berkovitz*, 486 U.S. at 536. Courts can get to this
14 answer by asking: “[d]oes ‘a federal statute, regulation, or policy specifically
15 prescribe a course of action’ that was not followed?” *O’Toole*, 295 F.3d at 1033
16 (quoting, *Berkovitz*, 486 U.S. at 536); *see also Sutton v. United States*, 26 F.3d 903,
17 908 (9th Cir. 1994) (“[t]he discretionary function exception does not protect the
18 government when it elects not to perform a duty that a statute or regulation
19 requires it to perform.”). Where a specific regulation exists, the government actor
20 or agency “has no rightful option but to adhere to the directive.” *Berkovitz*, 486
21 U.S. at 536.

22 In this case, the Army’s design and construction of the bypass road was
23 governed by the Manual on Uniform Traffic Control Devices (“MUTCD”). The
24 MUTCD is a document issued by the Federal Highway Administration (“FHWA”)
25 of the United States Department of Transportation that has been incorporated by
26 reference into the Code of Federal Regulations. *See* 23 C.F.R. § 655.601. The
27 MUTCD, as approved by the FHWA, is the “national standard for all traffic
28 control devices installed on any street, highway, or bicycle trail open to public
travel in accordance with 23 U.S.C. 109(d) and 402(a).” 23 C.F.R. § 655.603(a).
States and other federal agencies MUTCD’s must be in “substantial conformance”





1 with the national MUTCD. *See* 23 C.F.R. § 655.603(b)(1).

2 The United States Army is one of the many federal agencies that must
3 adhere to the standards set forth in the MUTCD. This is verifiable through a litany
4 of sources. For example, the MUTCD is incorporated by reference in 32 CFR
5 634.4(h)(3) (“The facility engineer [or] engineer officer . . . in close coordination
6 with the law enforcement officer, will . . . [e]nsure that traffic signs, signals, and
7 pavement markings conform to the standards in the current Manual on Uniform
8 Traffic Control Devices for Streets and Highways.”). The codification of the
9 MUTCD is also documented in the Army’s Regulations. *See* Army Regulation 55-
10 80, Ch. 3-11c(3)(c) (2003) (stating that “[a]ll installation traffic signals, signs, and
11 pavement markings will be in substantial conformance to FHWA’s Manual on
12 Uniform Traffic Control Devices for Streets and Highways.”), attached hereto as
13 Exhibit B. Finally, even in the documents submitted in support of the Army’s own
14 *Motion to Dismiss*, the Army acknowledges that “[a]ll traffic control devices and
15 signs will conform to the [MUTCD].” (Doc. #136-3, Ex. “C” (citing NTC
16 Regulation 190-5, § 2-1(a)).

17 The Army had no choice but to follow all of the mandatory Traffic Control
18 Device “**Standards**” set forth in the MUTCD.³ In fact, the Army’s own regulations
19 state that any deviation from the MUTCD must be approved, in writing, by the
20 Surface Deployment and Distribution Command (“SDDC”) and the FHWA. *See*

21
22 ³ It should be noted that the MUTCD provides a variety of direction for Traffic Control Devices
23 and not all of the MUTCD’s directions are mandatory. By way of example, the MUTCD contains
24 directional “Guidance,” which is defined as “a statement of recommended, but not mandatory, practice in
25 typical situations, with deviations allowed if engineering judgment or engineering study indicates the
26 deviation to be appropriate. All Guidance statements are labeled, and the text appears in unbold type. The
27 verb ‘should’ is typically used. The verbs ‘shall’ and ‘may’ are not used in Guidance statements.
28 Guidance statements are sometimes modified by Options.” *See* MUTCD, § 1A.13(B) (2009), attached
hereto as Exhibit C. The MUTCD further provides for directional “Standards,” which is defined as “a
statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device.
All Standard statements are labeled, and the text appears in bold type. The verb ‘shall’ is typically used.
The verbs ‘should’ and ‘may’ are not used in Standard statements. Standard statements are sometimes
modified by Options. Standard statements shall not be modified or compromised based on engineering
judgment or engineering study.” *See* MUTCD, § 1A.13(A) (2009), attached hereto as Exhibit C.



1 *id.* As demonstrated below, the Army did not comply with MUTCD Standard
2 3B.22 and the Army has not provided any evidence that a variance from MUTCD
3 § 3B.22 was obtained from SDDC or the FHWA.

4 **a. MUTCD § 3B.22 Requires the Use of A Longitudinal**
5 **“Bus Only” Sign Whenever the Government has**
6 **Designated Bus Traffic as the Preferential Use of a**
7 **Particular Lane.**

8 The Army’s *Motion* is supported by the declaration of the Deputy Director
9 of Emergency Services at the National Training Center Fort Irwin (“Deputy
10 Director”). (Doc. #136-2). According to the Army’s Deputy Director, the left lane
11 of the bypass road was dedicated to bus traffic. (Doc. #136-2, at 8:19-25 (stating
12 that the Army “directed all bus traffic to the *left-hand lane* of the bypass road.”)).
13 Further, the Army explicitly states in its *Motion* (at 4:24-27) that it “notified
14 commercial trucking companies and VVTA of the planned procedures, and
15 instructed buses to use the left lane of the bypass road, and commercial truck
16 traffic to use the right lane of the bypass road.”⁴ By dedicating the lanes of traffic
17 to specific types of vehicles, the Army triggered MUTCD 3B.22, which states that:

18 **When a lane is assigned full or part time to a**
19 **particular class or classes of vehicles, preferential lane**
20 **markings shall be used.**

21

22 **Where a preferential lane use is established, the**
23 **preferential lane shall be marked with one or more of**
24 **the following symbol or word markings for the**
25 **preferential lane use specified:**

26

27 **Bus only lane—the preferential lane use**
28 **marking for a bus only lane shall consist of the**
word marking BUS ONLY.

⁴ As noted above, the Bus Plaintiffs dispute the Army’s representations that it “notified commercial trucking companies and VVTA of the planned procedures, and instructed buses to use the left lane of the bypass road, and commercial truck traffic to use the right lane of the bypass road.” To the contrary, the Bus Plaintiffs maintain that they first learned of the preferential use of the left-lane for bus traffic only after the subject incident.



MUTCD (CA) § 3B.22 (Ed. 2003 Rev. 1, as amended for use in California) (emphasis in original), attached hereto as **Exhibit A**.⁵ Applying these standards to the Fort Irwin bypass road, the left lane of the bypass road should have been marked “**BUS ONLY**.” *See id.*

As previously stated, the bus lane was not appropriately marked with words on the pavement along the left hand lane. (*See* Doc. #136-3, Exhibit “G”). Furthermore, the Army has offered no evidence showing approval for this variance from the MUTCD, as required by the military’s own regulations. *See DoD Supplement to the National MUTCD*, pg. ii, (2015), attached hereto as **Exhibit D**. Therefore, the DFE **does not** protect the Army’s conduct in this case because the Army failed to perform a mandatory duty required by statute and/or regulation.

b. MUTCD § 3B.22 Leaves No Room For Discretion or Choice.

As previously noted, the first element of determining whether the DFE applies to divest a court of subject matter jurisdiction is whether the challenged action “involve[s] an element of judgment or choice.” *United States v. Gaubert*, 499 U.S. 315, 322 (1991). And, as also noted above where a “federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,” the inquiry is over and the discretionary function does not apply, given that the employee had no choice but to obey the binding regulation. *Berkovitz*, 486 U.S. at 536. However, a statute, regulation, or policy only removes discretion “when it is embodied in a *specific* and *mandatory* regulation or statute which creates clear duties incumbent upon governmental actors.” *Kennewick Irr. Dist. v. United States*, 880 F.2d 1018, 1026 (9th Cir. 1989) (emphasis original). In other

⁵ For purposes of this *Opposition*, the Bus Plaintiffs are citing to the California MUTCD (Ed. 2003 Revision 1) because the DoD has stated that “[i]n the interest of statewide uniformity, it is very important for military installations to not only follow the DOD Supplement, but also the MUTCD that is specific to their host state.” *See DoD Supplement to the National MUTCD*, pg. iii, (2015), attached hereto as **Exhibit D**. However, it should be noted that the provision at issue in this *Opposition* is nearly identical in both the California MUTCD and the National MUTCD.

1 words, if the statute or regulation leaves the governmental actor an element of
2 choice, then it is not specific or mandatory.

3 Here, Section 3B.22 of the California MUTCD provides a mandatory
4 “Standard” that left the Army no element of choice. The MUTCD’s definition of
5 “Standard” leaves no wiggle room. Standards “*shall*” be carried out; “should” or
6 “may” does not apply to them. *See* MUTCD, § 1A.13(B) (2009), attached hereto as
7 **Exhibit C**. Therefore, the MUTCD, and more specifically, MUTCD § 3B.22 is a
8 regulation that specifically prescribes a course of action that the Army *must follow*.

9 In the present case, the documents cited in support of the Army’s own
10 *Motion to Dismiss* demonstrate that the MUTCD is a mandatory requirement. The
11 Army’s Deputy Director of Emergency Services has testified that he is
12 “responsible for developing a comprehensive traffic safety program for vehicle
13 traffic within the physical boundaries of the base. In carrying out this
14 responsibility, [he is] guided by policies published at. . . the base level (see, e.g.,
15 **NTC Regulation 190-5**, Motor Vehicle Traffic Supervision).” (Doc. #137-2, ¶ 3)
16 (emphasis added). NTC Regulation 190-5 “prescribes the policies, responsibilities,
17 delegations and procedures for managing and administering the National Training
18 Center (NTC) & Fort Irwin motor vehicle traffic program.” (Doc. #136-3, pg. 81).
19 Chapter 2-1 of NTC Regulation 190-5 states that “[a]ll traffic control devices and
20 signs *will* conform to the ‘Manual of Uniform Traffic Control Devices for Streets
21 and Highways.’” (*Id*) (emphasis added).

22 Further, according to “Multi-Service Regulation (AR 55-80 . . . ,):
23 ‘Variances in the design and application of installation traffic control devices from
24 the standards contained in the MUTCD must be approved by Surface Deployment
25 and Distribution Command Transportation Engineering Agency (SDDCTEA) and
26 Federal Highway Administration (FHWA).’” *See DoD Supplement to the National*
27 *MUTCD*, pg. ii, (2015), attached hereto as **Exhibit D**. Thus, if the Army intended
28 to deviate from the MUTCD, it was required to get approval from the SDDCTEA





1 and the FHWA. *Id.* The Army has not offered any evidence that such approval was
2 granted.

3 In sum, in the analysis of whether the DFE should apply, the inquiry must
4 stop at the first prong, as there is a specific and mandatory regulation to follow,
5 leaving the Army with no choice to make. The Ninth Circuit has explained the
6 rationale of ending the inquiry after the first prong as follows:

7 The rationale behind excluding from immunity under the
8 discretionary function exception conduct which violates
9 specific mandatory safety standards is simple. Once the
10 government, having balanced economic, social and
11 political policy considerations, adopts safety standards in
12 the form of specific and mandatory regulations or policy,
employees do not have any discretion to violate these
standards. Indeed, to insulate such violations from
liability would undermine the prior exercise of a
discretionary function involved in formulating and
adopting the binding standards.

13 *Kennewick Irr. Dist. v. United States.*, 880 F.2d 1018, 1026-27 (9th Cir. 1989).

14 The government has properly used its discretion in adopting the MUTCD as
15 a safety standard; it must now live with that choice and the consequences that
16 come with not following it.

17 **2. THE DISCRETIONARY FUNCTION EXCEPTION DOES NOT**
18 **APPLY BECAUSE THE MUTCD WAS NOT CREATED UNDER**
19 **THE CONSIDERATION OF SOCIAL, ECONOMIC, AND POLITICAL**
20 **POLICY, NOR WAS THE ARMY'S FAILURE TO INSTALL**
21 **MANDATORY "BUS ONLY" MARKINGS A CONSIDERATION OF**
22 **SOCIAL, ECONOMIC AND POLITICAL POLICIES.**

23 The Bus Plaintiffs submit that the DFE analysis must end at the first prong.
24 However unlikely, assuming *arguendo* that this Court holds that the Army has
25 satisfied the first element of the test—finding that the MUTCD § 3B.22 is not
26 mandatory and that the Army's failure to properly mark the bus lane involved an
27 element of choice—we turn to the second prong of the DFE test.

28 Under the second element of the test, courts must ask whether the kind of
judgment or choice that was involved is one “that the discretionary function
exception was designed to shield,” i.e., the kind of judgment or choice that would



1 be “grounded in social, economic, and political policy.” *Berkovitz*, 486 U.S. at
2 536-37. If so, the exception applies and the government is immune from liability.
3 If not, the exception does not apply and the Court must deny the Army’s *Motion to*
4 *Dismiss*.

5 Courts have rightly pointed out that the second element of the test is much
6 more difficult to understand than the first element. *See Hughes v. United States*,
7 116 F.Supp.2d 1145, 1152 (N.D. Cal. 2000). This stems from the fact that it is
8 difficult to draw the line between cases where Congress felt government needed to
9 be immunized in order for the government to perform its responsibilities, and the
10 kinds of acts or decisions that could give rise to liability without creating any
11 serious threat to the ability of the government to meet its responsibilities. *Id.*
12 Relatedly, almost every decision by a governmental actor is arguably grounded in
13 social, economic, and political policy. *Id.* However, Congress could not have
14 intended that **every decision** by a governmental actor be so interpreted, or the
15 entire FTCA would be swallowed up the DFE exception. *Id.* Also, if courts found
16 all decisions to be grounded in social, economic, and political policy, then the
17 exception would in reality only consist of the first element, which is a result that
18 Supreme Court could accomplish, but has chosen not to do so. *Id.* Thus, passing
19 the first hurdle of the two part test is not a *de facto* victory for the Army.

20 In order to assess whether the decision to not mark the pavement with “BUS
21 ONLY” along the road was a decision rooted in social, economic, and political
22 policy, the Court must focus on the relationship between the specific decision itself
23 and the “regulatory environment” in which that decision was made. *Id.* at 1153. By
24 “regulatory environment” courts mean the applicable regulations, statutes, and
25 policies that apply to the decision-maker. *Id.* In this case, the “regulatory
26 environment” is the MUTCD. *Id.*

27 Next, the Court must answer the following questions: what are “the purposes
28 that the regulatory scheme seeks to accomplish?”; what are the “policies which led



1 to the promulgation of the regulations?"; and, what are "the 'topics' or subjects
2 that are addressed by the regulations or guidelines or statements of policy that form
3 the setting in which the decision in issue is to be made." *Id.* (quoting *Gaubert*, 499
4 U.S. at 324-25, n. 7). After considering these questions, the Court must turn its
5 attention to the specific decision (i.e., whether or not to mark the left lane of the
6 bypass road with the words "BUS ONLY"). *Id.*

7 The Court must then ask if the regulatory environment addresses the kind of
8 decision that serves as the basis for the plaintiff's claim (i.e., did the MUTCD
9 address the issue of marking preferential lanes). *Id.* If the decision was addressed
10 in the regulatory environment within which the government official was working,
11 and if the regulations confer discretion on the official when making the decision
12 (*which would have to be the case for the court to have proceeded to consideration*
13 *of the second element in the DFE test*⁶), then "the very existence of the regulation
14 creates a strong presumption that a discretionary act authorized by the regulation
15 involves consideration of the same policies which led to the promulgation of the
16 regulations." *Id.* at 1154, (quoting *Gaubert*, 499 U.S. at 324). In other words, if the
17 policies behind the regulation were rooted in social, economic, and political
18 policies, then the decision, which is addressed in the regulation, is presumed to be
19 rooted in the same social, economic, and political policies. This also shifts the
20 burden of proof from the government to the party bringing suit against the
21 government. Thus, the government no longer has the burden of proving the DFE
22 applies, the plaintiff has the burden of proving by clear and convincing evidence
23 that the DFE does not apply.

24 This presumption can be overcome by the plaintiff in one of two ways. First,
25 the plaintiff may show that the pertinent regulations were not the product of
26 consideration of public policy when they were drafted. *Id.* at 1154. If this were

27 _____
28 ⁶ The Bus Plaintiffs again emphasize that they believe that the Army cannot satisfy the first prong
of the test, as the MUTCD *does not* give discretion in marking the preferential lanes.



1 shown, then it would follow that the decision contemplated by the regulation was
2 also not rooted in public policy. *Id.* Second, the plaintiff may show that even
3 though the applicable regulation is grounded in public policy, the decision itself,
4 while mentioned by the regulation, is divorced from the policies underlying the
5 regulation. *Id.* at 1154-55. In other words, while the regulation is grounded in
6 social, economic, and political policy, the decision is not grounded in the policies.

7 Again, the decision at issue here is about whether to mark the left lane of the
8 bypass road with the words “BUS ONLY.” The regulatory environment in which
9 the decision to mark preferential lanes is the MUTCD.

10 Answering the first question that applies to the regulatory environment, the
11 purpose of the MUTCD, as explained by the FHWA, is to provide uniformity of
12 signs, signals, and pavement markings in order to promote highway safety and
13 efficiency on the Nation's streets and highways. *See* U.S. Department of
14 Transportation, http://mutcd.fhwa.dot.gov/knowledge/faqs/faq_general.htm (last
15 visited Dec. 10, 2015).

16 Answering the second question that applies to the regulatory environment,
17 the policies that originally drove the purpose of the MUTCD was safety to vehicles
18 and pedestrians, balanced with cost. *See* MUTCD, pg. 3 (Ed. 1935), attached
19 hereto as **Exhibit E**.

20 Answering the third question that applies to the regulatory environment, the
21 topic or subject of the regulation is travel, and more specifically, the signs, signals,
22 and pavement markings that help to direct, control, and manage travel. Also, as is
23 laid out extensively above, the MUTCD addresses the issue of marking preferential
24 lanes.

25 Therefore, the initial application of the analysis shows that, in this case, the
26 burden must be shifted from the government to the Bus Plaintiffs. The Bus
27 Plaintiffs must now demonstrate that the DFE does not apply.



a. The MUTCD Was Not Created With Social, Economic, And Political Policy Considerations In Mind, So The Directive To Mark The Lanes Is Also Not Rooted In Social, Economic, And Political Policy.

Bearing this shift of burden in mind, and examining the regulatory environment under the questions asked above, it is clear that the purpose, policy, and subject of the MUTCD is not one that implicates social, economic, or political policy, and thus torts that are committed by the government that relate to and implicate the MUTCD are not the type that Congress meant to immunize. This is true because safe and efficient travel does not implicate social, economic, or political policy. Indeed, the considerations within the MUTCD center on “quasi-scientific and quasi-technical bases” that are unrelated to public policy. *Hughes*, 116 F.Supp. at 1158. The considerations of the MUTCD are closer to considerations recognized in *Hughes* – the “likelihood of an accident occurring, the severity of the likely consequences if an accident did occur, the likely effectiveness of warnings etc.” *Id.* These considerations were not found to implicate public policy in *Hughes*, and they should not be found to implicate public policy here. *Id.* Also, the Ninth Circuit has explained that “matters of scientific and professional judgment – particularly judgment concerning safety – are rarely considered to be susceptible to social, economic, or political policy.” *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005).

Therefore, because the MUTCD was not the product of consideration of public policy, then a decision authorized by the regulation, in this case, marking a preferential lane did not involve consideration of public policy, and thus this conduct is not immunized under the DFE.

b. Even If The MUTCD Was Created With Social, Economic, or Political Policy Considerations In Mind, The Specific Directive Addressing Marking Lanes Does Not Implicate Social, Economic, Or Political Policy.

Assuming that the Court disagrees with this analysis, and does find that the MUTCD implicates social, economic, or political policy, the DFE still does not



1 apply, as the policy considerations underlying this regulation is separate from the
2 policy considerations that underlie the MUTCD. In other words, “even though the
3 kind of decision in issue was in some sense anticipated by the regulations, there is
4 a clear disconnect between the underlying policy purposes that shaped the
5 regulatory environment and that decision.” *Hughes*, 116 F.Supp. at 1155.

6 There is a disconnect between the policy behind installing a “BUS ONLY”
7 marking along the left lane of the bypass road and the policy behind the MUTCD.
8 The only public policy consideration that can be connected to the MUTCD is
9 economic policy. Travel, which is affected by signs, signals, and markings, can
10 have a large economic impact. But, the cost of installing a “BUS ONLY” marking
11 along the left lane of the bypass road is so small as to not rise to a level of being a
12 public policy consideration. Indeed, this is proven by the fact that, after the
13 accident, the Army finally installed a “BUS ONLY” marking along the left lane of
14 the bypass road.

15 Also, the decision to mark the left lane of the bypass road is related to safety,
16 and not economic policy. There is a large body of case law that addresses when
17 safety considerations implicate public policy and when they do not. The line can be
18 drawn between decisions that focus solely on safety and those that are broader than
19 just safety concerns. Collectively, the cases that follow demonstrate that the
20 decision to mark the left lane of the bypass road is one that focuses solely on
21 safety.

22 In *Summers v. United States*, 905 F.2d 1212, 1215-16 (9th Cir. 1990), the
23 Ninth Circuit held that the DFE did not protect the Park Service where it had failed
24 to warn visitors of the danger of stepping on hot coals in a fire ring in the Golden
25 Gate National Recreation Area. The court found that “NPS’s failure to identify and
26 warn of the danger to barefoot visitors of hot coals on park beaches resembles
27 more a departure from the safety considerations established in Service policies . . .
28 than a mistaken judgment in a matter clearly involving [policy] choices” *Id.* at



1216. Similarly, in *Faber v. United States*, 56 F.3d 1122, 1127 (9th Cir. 1995), the Ninth Circuit held that the Forest Service’s failure to post a sign warning of danger of diving off a waterfall in a National Forest was not protected by the DFE. The Court stated that “[i]t would be wrong to apply the discretionary function exception in a case where a low-level government employee made a judgment not to post a warning sign” *Id.* at 1125. And, in *Sutton v. Earles*, 26 F.3d 903, 910 (9th Cir. 1994), the Court held the Navy’s decision not to post speed limit signs after creating a hazard to navigation was not protected by the discretionary function exception, stating that “[a] decision not to warn of a specific, known hazard for which the acting agency is responsible is not the kind of broader social, economic or political policy decision that the discretionary function exception is intended to protect.” Finally, in *Seyler v. United States*, 832 F.2d 120, 123 (9th Cir. 1987), the Ninth Circuit held, “we doubt that any decision not to provide adequate signs would be of the nature and quality that Congress intended to shield from tort liability.”

However, this case is unlike *Childers v. United States*, 40 F.3d 973 (9th Cir. 1995), where the decision not to post signs and to close portions of Yellowstone National Park was the result of policy decisions regarding how best to manage the park during winter. The court explained:

Unable to maintain all the trails in the park, cognizant that posting warning signs would inadvertently attract visitors to unmaintained trails, and unable to post signs throughout the park, NPS could only decide to close large portions of the park, or to keep the park open, provide visitors with information on the hazards, and take steps to discourage visitors from going to hazardous areas.

Id. at 976. Obviously, closing or opening a National Park has social, economic, and political considerations that are not present when talking about signs, signals, and markings that direct the safe and efficient flow of traffic.

Similarly, in *Valdez v. United States*, 56 F.3d 1177, 1180 (9th Cir. 1995), the



1 failure to install warning signs alongside a potentially hazardous stream was held
2 to “implicate[] a choice between the competing policy considerations of
3 maximizing access to and preservation of natural resources versus the need to
4 minimize potential safety hazards.” *See also Blackburn v. United States*, 100 F.3d
5 1426, 1434 (9th Cir. 1996) (following *Valdez* and *Childers*, holding the decision
6 how to warn the public of the hazard of diving off a bridge in Yosemite National
7 Park involved considerations of visitor enjoyment, preservation of historical
8 features, minimization of manmade intrusions and protection of wildlife and the
9 environment).

10 This case law clearly shows that when a decision is centered solely on
11 safety, then it is not protected by the DFE. And, the decision to not install a “BUS
12 ONLY” marking along the left lane of the bypass road was a decision strictly tied
13 to safety, so the reasoning from *Seyler* must apply: “we doubt that any decision not
14 to provide adequate signs would be of the nature and quality that Congress
15 intended to shield from tort liability.” *Seyler*, 832 F.2d at 123. Also, the Ninth
16 Circuit has clearly articulated what happens in such a situation: “where the
17 challenged governmental activity involves safety considerations under an
18 established policy, rather than the balancing of competing policy considerations,
19 the rationale for the exception falls away . . . [.]” *ARA Leisure Servs. v. United*
20 *States*, 831 F.2d 193, 195 (9th Cir. 1987).

21 In sum, the Army’s decision not to install a “BUS ONLY” marking along
22 the left lane of the bypass road was not shielded by the DFE, as the choice was not
23 grounded in social, economic, or political policy. Instead, the decision turned on
24 safety and efficiency concerns, which are not the type of decisions that Congress
25 meant to protect under the DFE.

IV. CONCLUSION

The Bus Plaintiffs ask this Court to deny the Army's *Motion* because the DFE is inapplicable in this case and this Court has subject matter jurisdiction over the government.

Dated this 14th day of December, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, and that on the 14th day of December, 2015, the foregoing **OPPOSITION OF THE BUS PLAINTIFFS TO THE UNITED STATES OF AMERICA’S MOTION TO DISMISS THIRD PARTY COMPLAINT** was served by e-service, in accordance with the Electronic Filing Procedures of the United States District Court:

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